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In The

Supreme Court Of The United States

DONALD STENBERG, *ETC., ET AL,*

Petitioner,

v.

LEROY CARHART, *ETC., ET AL.*

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIÆ* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION FOR THE PROTECTION OF UNBORN CHILDREN IN SUPPORT OF PETITIONER

With Appendix

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MOTION FOR LEAVE TO FILE *AMICUS CURIÆ* BRIEF

Amicus Curiæ THE NATIONAL ASSOCIATION FOR THE PROTECTON OF UNBORN CHILDREN (hereinafter, NAPUC) moves this court for leave to file an *amicus curiæ* brief on the grounds that NAPUC wishes to bring to this court's attention relevant matter that has not, or will not, be brought to this court's attention by the parties.

This court has held that a person whose life is, or may be, subject to forfeiture should have all of the assistance that may be available. *Franklin v. Lynaugh*, 487 U.S. 164 (1988); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982); *Green v. Georgia*, 442 U.S. 95 (1979); *Lockett v. Ohio*, 438 U.S. 586 (1978); *Hunter v. Florida*, 416 U.S. 943 (1974). Allowing *amicus curiæ* at this stage assures a full review of the issues and is fair in a case where the lives of millions of innocent unborn and partially born children are at stake.

The Interest of *amicus curiæ* is set forth at page 1 of the Brief. Counsel has contacted all parties. No party has provided consent as of this writing.

Dated: February 24, 2000.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

Amicus is an unincorporated association, newly formed, for protection of unborn and partially born children. It shares the views of its counsel who has taken an oath to uphold and defend the Constitution of the United States and to defend the poor, downtrodden, and oppressed. He has presented similar *Amicus Curiæ* Briefs on behalf of other states.[2] He is a former professor of Law, University of Northern California, Lorenzo Patiño School of Law. He is affiliated with, but does not represent, a number of pro-life groups and has himself concentrated his practice in the areas of Civil Rights Law, Human Rights Activities, Constitutional Law, and Criminal Defense. He has written two articles on Abortion entitled: ABORTION AND INALIENABLE RIGHTS IN AMERICAN JURISPRUDENCE: A PROSPECTIVE POLICY (©1989); Lynch, *"Posterity", A Constitutional Peg for the Unborn*, 45 AJJ 401 (Notre Dame Law School. 1995). He lived four years in England where he engaged in a self-directed study of the English Political System from the inception of the *Magna Carta* (1215). He is a graduate of McGeorge School of Law (1978).

This case touches and concerns the continuing validity of *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny*, and, as

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[1] Counsel for NAPUC authored this brief in its entirety. No person or entity, other than NAPUC, its associates, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (For Appellant); *Ohio v. Akron Reproductive Center*, 110 S.Ct. 2972 (1990)) (For Appellant); *Hodgson v. Minnesota v. Hodgson*, 497 U.S. 417 (1990) (For Minnesota; 2 Briefs); *Turnock v. Ragsdale*, 503 U.S. 916 (1992) (Dismissed; after tentative opening brief submitted to ACLU for review prior to filing) (For Appellant); *Bray v. Alexandria*, 113 S.Ct. 753 (1993) (For Petitioner). Counsel has also presented an amicus brief in other unrelated cases. *Walters v. NARS* (*amicus curiæ* Andrew Groza), 473 U.S. 305 (1985); *Dickerson v. USA* (*amicus curiæ* Rutherford Institute), No. 99-5525 (Pending)

such, a decision herein will affect not only the laws of the State of Nebraska, but all of its sister states and territories of the United States. This Court's *amicus* is concerned about the inclusion of unborn and partially born children as present members of "Posterity" in the Preamble of the Constitution, and is concerned, and has been concerned for some time, that unborn children have been unrepresented or underrepresented in court in the years of litigation that have followed *Roe* in 1973. Counsel was convinced then, and *Amicus* is convinced now, that the Court was misled as to the meaning of "personhood." It is *amicus curiæ*'s belief that unborn and partially born children are present members of "Posterity" in the Preamble of the Constitution, and it is imperative, for the preservation of a basic respect for human life and the values enshrined in the Constitution of the United States, that these children be recognized as present members of "Posterity" entitled to protection.

SUMMARY OF ARGUMENTS

1. Unconstitutional conduct cannot be justified by widespread and long use. With respect to the Constitution, *stare decisis* is of less importance than in other areas, and therefore, the holding of *Roe v. Wade* and its *progeny* is not necessarily binding on this Court, and in fact should be rejected for reasons set forth hereinafter.

2. Neither the 5th nor 14th Amendment define personhood. This court has recognized aliens and artificial persons as entitled to protection; therefore it is an anomaly not to find unborn and partially born children are entitled to protection. The most logical place to look for meaning is the Preamble because, while it does not create rights, it defines for whom the rights were created. From a reading of the Preamble, and the term "Posterity," a reasonable construction includes unborn and partially born children as present members of "Posterity." It is consistent with the intent of the framers, and a common law understanding, that unborn and partially born children were persons in being, therefore persons protected by the Constitution. Because this was overlooked in *Roe v. Wade*, *Roe v. Wade* and its *progeny* must be overruled as unsound in principle, unworkable in practice and contrary to the intent of the framers.

3. The court failed to join an indispensable class of persons, unborn and partially born children, and appoint a *guardian ad litem* to advocate their rights, and therefore the decision below must be reversed.

4. Based upon the foregoing, this court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny*, reverse the decision of the court below and remand for further proceedings not inconsistent with this Court's views.

ARGUMENTS

I.

STARE DECISIS IS LESS BINDING ON THIS COURT IN CONSTITUTIONAL ISSUES DESPITE LONG STANDING AND WIDESPREAD PRACTICE; *ROE* AND ITS *PROGENY* DID NOT CONSIDER THE TERM "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Statutes or practices inconsistent with the Constitution, however pervasive, cannot create a power that the Constitution does not bestow, nor furnish a construction that the Constitution does not warrant. *Field v. Clark*, 143 U.S. 649 (1891); 3 Rotunda, Treatise on Constitutional Law § 23.33, p. 512 (1986). This Court invalidated in part its own Rules of Court which were in part based on a Congressional Statute requiring attorneys to take an oath with respect to their activities before the end of the Civil War, when it was pointed out that the provision was in fact unconstitutional. *Ex Parte Garland*, 4 Wall. 333 (1867). Faced with the constitutionality of "separate but equal" facilities, a practice in existence throughout the south, and sanctioned by this Court for 58 years, this Court nonetheless correctly overruled *Plessy v.*

Ferguson, 163 U.S. 537 (1896) in *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*). *Accord, Bolling v. Sharpe*, 347 U.S. 497 (1954). Moreover, where the importance of the question is great, and touches sensitive issues which need to be resolved, this Court has not allowed the fact that some issues were not properly addressed in the courts below to prevent further argument on the issues omitted so that the continuing controversy could be settled. *Brown I*, 347 U.S., at 489, 496 (1954); *Brown v. Board of Education.*, 349 U.S. 294, 298 (1955) *(Brown II)* (for remedy).

The [*Planned Parenthood v.*] *Casey*[, 505 U.S. 833 (1992)] court noted that *Roe*[3] stood at the intersection of two lines of decisions. One, typified by *Griswold v. Connecticut*, 381 U.S. 479 (1965), are those cases which found a right to privacy in which the state had no right to interfere with personal choices regarding sex,[4] family, and whether to bear and

[3] Interestingly, the *Roe* citations in support of a woman's right to privacy simply do not support an absolute right to privacy. Indeed, in what appears now to be a false first step, this Court observed the right to privacy was first noted in 1891, citing a case that had nothing to do with a constitutional issue. *Union Pacific v. Botsford*, 141 U.S. 250, 251 (1891); but *cf. Sibbach v. Wilson & Co.*, 312 U.S. 1, 11 (1940). *Sibbach* teaches that *Botsford* was not a substantive rule of constitutional law of privacy, but rather, one of statutory construction. In 1891, there was no authority for a physical examination of a plaintiff, a legislative omission cured by the Federal Rules of Civil Procedure, Rule 35, which was no affront to privacy because the plaintiff voluntarily advanced the issue by bringing suit.

[4] The court has not been consistent with respect to sex. In *Bowers v. Hardwick*, 478 US. 186 (1986) this Court held that the right of privacy may not be relied upon by consenting adults in their own bedroom to engage in homosexual conduct forbidden by state law. No case has held that a woman, based on her right to privacy, can do whatever she wishes with her body. Acts of prostitution, even in the privacy of her own bedroom, may be in violation of state law and said law is still Constitutional. *A fortiori*, if unborn and partially born children are persons in the constitutional sense, it is not possible that a woman has an absolute right to take the child's life.

beget children. *Casey*, 505 U.S., at 857. The other line of cases found there exists a certain individual autonomy that limited governmental power regarding medication and the right to die, which supports the *Roe* conclusion. *Ibid.* The *Casey* plurality suggests that *Roe* might be *sui generis*, *i.e.*, one of a kind, but since there had been no erosion of its central premise, noting the change in membership and squabbling among the justices, even if the court were to assume error by *Roe*, "it only went to the strength of the state interest in fetal protection, not to the recognition by the Constitution of the woman's liberty." *Casey*, 505 U.S., at 858-59. The soundness of *Roe*, said the *Casey* Court, was apparent from a consideration of the alternative. "If indeed, the woman's interest in deciding whether to bear and beget a child had not been recognized in *Roe*, the State might as readily restrict a woman's right to choose to carry a pregnancy to term as to terminate it, to further asserted state interests in population control, or eugenics, for example." *Casey*, 505 U.S., at 860. After a review of *stare decisis*,[5] the lack of anything new regarding the status of unborn children, and in view of widespread reliance, *Casey* abandoned *Roe's* trimester periods, and affirmed both women's rights and the "State's interest in protecting human potentiality" after viability, provided there was no undue burden on a woman's choice. *Ibid.*

Casey begs important questions. The central issue is not whether a woman has a right to decide whether to beget children; of course she does. And of course there is no issue as to termination of a pregnancy; all pregnancies will terminate at the end of term, by natural birth, caesarian section, or otherwise. The issue is: whether a woman has the right to choose to terminate a pregnancy that terminates the life of an unborn or partially born child once begot. The *Roe* Court reached the result it did because, it said, Texas had failed to

[5] Justice O'Connor conceded there was an erosion of support by the justices as to the continued validity of *Roe*.

demonstrate where in the Constitution unborn children were Constitutional persons. 410 U.S., at 157-59.[6] *Casey* perpetuates the *Roe* error on the basis there has been no development in constitutional theory that undermines the *Roe* premise. Neither opinion addresses the Preamble,[7] nor its meaning. Furthermore, there has been a growing recognition that this court erred. Comments, *To Be and Not to Be: Inconsistencies in the Law Regarding the Legal Status of the Unborn Fetus*, 71 Temple Law Review 963, 994 (1998) (hereinafter, *To Be and Not to Be.)*; Notes, *Fourteenth Amendment Personhood; Fact or Fiction?*, 73 St. John's Law Review 495, 530-40 (1999) (hereinafter, *Fourteenth Amendment Personhood);* Lynch, *"Posterity": A Constitutional Peg for the Unborn*, 45 AJJ 401 (1995) (hereinafter, *Lynch*).

This court can judicially notice its own docket and the judiciary, which has been impacted by abortion cases, and that its opinions have been heavily criticized as being unsound in principle and unworkable in practice. *To Be and Not to Be*; *Fourteenth Amendment Personhood, supra* ("our judiciary is dishonest in its treatment of fetuses"); Lynch, *supra*. Similarly, it is well known that the abortion controversy has led to disorder in the streets throughout the country.[8] Moreover, beginning with *Webster v. Reproductive Health Services*, 492 U.S. 490, 518-519 (1989) (Rehnquist, Ch. J.), this court has increasingly found *Roe* to be unsound

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[6] A reading of the Petition, Response, and Briefs by the parties and *amicus* in *Roe* shows the primary focus was on the term person as found in the 5th and 14th Amendments. 75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES.

[7] Douglas mentioned "liberty" in the Preamble, but that was hardly an exposition on the meaning of "Posterity" in the Preamble.

[8] It is not suggested that this disorder is the reason for overruling *Roe*. Quite the contrary, the reason is unborn and partially born children are persons who are present members of "Posterity" in the Preamble of the Constitutional. The mention of this problem is but recognition that the problem must be resolved.

in principle and unworkable in practice. In fact, a proper reading of the Preamble *in pari materia* with the body of the Constitution leads to this realization:

A person is created at conception. Preamble.

A person becomes a citizen at birth. 14th Amend., § 1.

A citizen can vote at age 18. 26th Amend., § 1.

Thus, this Court should now recognize, in light of the above, that it has retreated from *Roe v. Wade*, 410 U.S. 113 (1973), and in light of the arguments to follow, should now overrule *Roe* and its *progeny* prospectively, and remand for further proceedings in light of the fact that unborn and partially born children are present members of "Posterity" in the Preamble, thus persons entitled to protection; or remand for consideration by the lower courts as to whether unborn and partially born children are present members of "Posterity" entitled to protection.[9]

II.
UNBORN AND PARTIALLY BORN CHILDREN ARE PERSONS IN THE CONSTITUTIONAL SENSE BY VIRTUE OF THEIR INCLUSION AS PRESENT MEMBERS OF "POSTERITY" IN THE PREAMBLE OF THE CONSTITUTION

Neither the 5th nor the 14th Amendment defines person. The 14th Amendment defines citizenship.[10] In other contexts, the court has held that aliens[11] and artificial persons[12]

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[9] Nebraska raised personhood below as being found in the 14th Amendment, and this court denied *certiorari* on this issue. This brief deals with personhood as found in the Preamble. A slip of the pen ought not foreclose Nebraska from amending its argument. Indeed, this court has held that appellate courts cannot ignore the correct law, regardless of the law and facts relied on below.

[10] "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, ..."

[11] *E.g., Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976); Const., Art. VI, Treaty Clause; McKechnie, *Magna Carta*, Art. 41 (Aliens).

are persons entitled to Constitutional protection. Not to recognize unborn and partially born children as a person is therefore an anomaly. As "Person," is used without qualification, the most logical place to look for meaning is the Preamble,[13] because while its purpose is not to create rights,[14] it does define for whom the rights were created.[15] The Preamble reads:

> "We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America." Appendix, p. A6.

The words "people of the United States" and "citizens" are synonymous terms.[16] The Preamble creates two classes

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[12] See Chicago B. & Q. R.R. Co. v. Iowa, 94 U.S. 155 (1877); *E.g.*, *Land v. Dollar*, 330 U.S. 731 (1947) (*Replevin*; Stock taken under color of federal law).

[13] The first record that a sovereign rules with the consent of the governed appears to be I Sam. 16, II Sam. 5, 9-20, I Kings 1-2. When David's father died, he ruled over the seven tribes of Judah for seven years. Then the elder of Israel met with Davit at Hebron, and they made a contract for David to rule them as well. Thereafter David ruled over all of Israel and Judah for forty years. Other codes, most notably the Code of Hammurabi, were in writing, but were unilateral acknowledgments of human rights. The *Magna Carta*, *infra*, appears to be the first written document executed by both the sovereign and its subjects. The Constitution abolished traditional sovereignty, placed sovereignty in the People, signed by their representative, and ratified by them according to their respective state procedures.

[14] Scott v. Sanford, 60 U.S. (19 How.) 404 (1857); Cruikshank, supra, 92 U.S. (2 Otto), 542, 549. The 13th & 14th Amendments do not overrule Scott, but only remove the limitations found, thus enlarging the class of persons who are citizens.

[15] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

[16] *Scott v. Sanford*, 60 U.S. (19 How.) 404 (1857); *Cruikshank*, *supra*, 92 U.S. (2 Otto), 542, 549

of sovereignty, "ourselves" and "our Posterity."[17] Its purpose appears to be to include "Posterity"[18] on an equal footing with, and having the same rights as, "ourselves" as evidenced by the parallel structure of the phrase. Therefore, "Posterity" as to those who are lives in being is synonymous, if not with "citizenship," [19] surely "personhood." [20] This understanding is consistent with an understanding of the meaning of "Posterity" in 1787.[21] In 1644, in a well known pamphlet, it was argued that "Parliament could no more censure the issue of the mind than it could the issue of the womb." [22] At common law, certain members of future generations, unborn and partially born children,[23] were lives in being for the purposes of the Rule Against Perpetuities. [24] Moreover, prenatal injuries were to a limited extent recognized at Common Law,[25] and it

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[17] ABORTION AND INALIENABLE RIGHTS, etc, supra, at page 1.

[18] "Posterity" is capitalized in the original. As a noun is capitalized only if it identified a particular person, place, or thing, it implies the framers considered the word important

[19] See footnote 9, supra. It is probably more accurate to say unborn, partially born, children are persons who becomes a citizen (§ 1, 14th Amendment), except that the right to vote comes at age 18. (26th Amendment)

[20] See footnotes 4 and 12

[21] ABORTION AND INALIENABLE RIGHTS, etc, supra, at page 1.

[22] Milton, AREOPAGITICA (1644).

[23] Aristotle, *Politics*, VII, 1335b, 24-26; Aquinas, *Summa Theologiæ*, 1, q. 76, a. 5 and q. 118; Noonan, CONTRACEPTION, 86-88 (Harv. U. Press, 1965). The Old Testament provided a remedy against persons causing a miscarriage. Exodus 21:22. It is not repugnant to the 1st Amendment Establishment Clause merely because civil law corresponds to the tenets of some religions. *E.g., Witters v. Washington Dept of Social Svcs for the Blind*, 474 U.S. 481 (1986).

[24] Gray, *The Rule Against Perpetuities* (4th Ed.); *Alamo School Dist. v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960).

[25] "To kill a child in its mother's womb is now no murder, but a great misprision: but if the child be born alive and die by reason of the

does not appear that tort actions for the injuries were barred.[26] Had the framers used "and our heirs", it would have created the equivalent of a fee simple absolute with powers of alienation, [27] a concept clearly inconsistent with the concept of "unalienable rights" in the Declaration of Independence[28] and the concept of an "indestructible and perpetual union"[29] in the Preamble, whereas if construed as a fee tail,[30] it would be consistent with an intent to create "unal-

potion or bruises it received in the womb, it is murder in such as administered or gave them." Lord Coke, repeated by Blackstone at Book IV, p. 198. His reasoning may have been influenced by (1) "No man shall be taken or imprisoned upon the appeal of a woman, for the death of any other than her husband." *Magna Carta* (1215), Art. 54. As her unborn child was not her husband, obviously, there was a failure of evidence. (2) medical knowledge as to unborn children was quite primitive when compared to modern medical knowledge.

[26] *Sinkler v. Kneale*, 401 Pa 267, 164 A.2d 93, 94 (1960); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922)); Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135.

[27] *White v. Hart*, 80 U.S. (13 Wall.) 646, 650 (1872). Other constructions result in a power of alienation inconsistent with unalienability: contingent remainder, Gray, THE RULE AGAINST PERPETUITIES (4th Ed.); *Alamo School District v. Jones*, 182 Cal.App.2d 180, 6 Cal.Rptr. 272 (1960); the rule in Shelly's Case, 31 *Corpus Juris Secundum*, Estates § 4.

[28] "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, ... that Governments are instituted among Men, deriving their just powers from the consent of the governed, ..." American Declaration of Independence, § 2; Schwartz, THE BILL OF RIGHTS, A DOCUMENTARY HISTORY.

[29] *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) construing Preamble.

[30] *Hertz v. Abrahams*, 110 Ga. 707, 36 S.E. 409 (1900); *Haward v. Howe*, 12 Gray (Mass.) 49 (1858); *Gannon v. Albright*, 183 Mo. 238, 81 S.W. 1162 (1904); *Kay v. Scates*, 37 Pa 31 (1860); *Larew v. Larew*, 146 Va. 134, 135 S.E. 819 (1926); 28 AMERICAN JURISPRUDENCE, Second, Estates, § 53. *Cf., Barber v. Pittsburgh, F.W. & C.R. Co.*, 166 U.S. 83 (1897); *Anderson v. United Realty Co.*, 79 Ohio St. 23, 86 N.E. 644, affmd 222 U.S. 16 (1911), (recognizing by *dictum* common law rule). The Constitution concerns estates and interests in land. Art. I, Sec. 8, cl. 17 (District of Columbia; Places purchased); Art. III, Sec. 3, cl. 2 (for-

ienable rights" and a "perpetual union," [31] for the protection of future generations, including unborn and partially born children.

The Constitution was submitted to the People for ratification.[32] Implicit in the Preamble is the concept that the Constitution is to be a social contract[33] wherein society promises the individual unalienable rights, in return for which the individual promises to conform to the laws of society which do not derogate[34] from unalienable rights. Mutual promises have always been considered sufficient consideration for enforceability.[35] As persons under the age of capacity[36] could not consent,[37] it appears the framer's intended that adults were of the class "ourselves," and all others of the class "Posterity,"[38] to include lives in being, *i.e.* unborn and partially born children.

Taking the approach that unborn and partial born children are present members of "Posterity" answers a number of

feitures); Art. IV, Sec. 2, cl. 1 (privileges and immunities), Sec. 3, cl. 2 (property of the United States); Amendment III (Quartering of soldiers); Amendment IV (Secure in . . . Houses); Amendment V (nor be deprived of . . . property . . . nor shall private property be taken. . . .")

[31] *White v. Hart*, 80 U.S. (13 Wall.) 646 (1872) construing Preamble.

[32] 2 Farrand, Max, The Constitutional Debates, pp. 152, 163, 177, 193, 196, 209, 565, 582, 590, 651; 3 Rotunda, op cit., p. 663, note 1.

[33] E.g., Hobbes, LEVIATHAN (1651); Locke, SECOND TREATISE OF GOVERNMENT (1690); Laqueur, THE HUMAN RIGHTS READER (1979).

[34] Verdross, *Forbidden Treaties In International Law*, 31 AJIL 571 (1937); *Id, Jus Dispositivum & Jus Cogens In International Law*, 60 AJIL 55 (1966).

[35] Chitty on Contracts (23rd Ed, 1968) 134; Restatement, Contracts (1st) § 77; *Coggs v. Berherd*, 2 Ed.Raym. 909 (1703).

[36] "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." 26th Amend, § 2.

[37] Chitty on Contracts.

[38] 2 Stephens Commentaries 342 (1841).

theoretical problems. *Casey*, 505 U.S. at 860. (O'Connor, J.) First, it is further development of constitutional theory recognizing there is not just one right, or more precisely - life, at stake, but two, the mother's, a member of "ourselves," and her unborn or partially born child's, a present member of "Posterity." Second, it supports the proposition the State cannot force women to terminate pregnancy or engage in eugenics, because her unborn or partially born child is a person entitled to protection. Third, it sets a standard that termination of a pregnancy occurs as a result of natural birth, or based on necessary medical intervention for the preservation of both lives. Fourth, it assures a woman's right to seek medical intervention to preserve both lives, if possible, without undue state influence. Fifth, it takes the courts out of the quagmire of trying to guess when unborn and partially born children become "viable" and therefore entitled to protection. With conception, there is no guesswork. Finally, it does justice by respecting the Constitutional guarantee to protect human life.

III.

THE STATES HAVE A RIGHT TO REASONABLE REGULATIONS FOR THE PROTECTION OF UNBORN AND PARTIALLY BORN CHILDREN

The Constitution Provides, in relevant part:

> "No person shall be, ... deprived of life ... without due process of law." U.S. Constitution, 5th Amendment.

Neither a State nor the federal government may utilize tax money to take life without due process of law.[39] *E.g.,*

[39] Under international law, a state has the obligation to provide police protection for its citizens at home. (Verdross, *Forbidden Treaties International. Law*, 31 AJIL 571 (1937); Verdross, *Jus Dispositivum & Jus Cogens in International. Law*, 60 AJIL 55 (1966)). Protecting an individual through due process in American jurisprudence is derived from the *Magna Carta* (1215). *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856). McKechnie, *Magna Carta*; the Great Charter of King John. McKechnie is the recognized scholar on the *Magna Carta*. 10 Halsbury's Statutes of England (4th Ed) Constitutional Law, 25 Edw. 1 *(Magna Carta)*(1297), p. 14, Notes, ¶ 2.

Flash v. Cohen, 392 U.S. 83 (1968). Assuming, *arguendo*, that unborn and partially born children are present members of "Posterity," they have a right to representation, 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England, Infants §§ 132, 135 (1st ed, 1911), to be heard on the question as to whether their lives should be terminated. *See generally, Mullane v. Central Hanover B&T*, 339 U.S. 706 (1950); *Furman v. Georgia*, 408 U.S. 238 (1972), and it *progeny*; *Cruikshank*, *supra*, 92 U.S. (2 Otto), at 549.

Unborn or partially born children have all of the characteristics of life.[40] *See generally, To be and not to be, supra*; *Fourteenth Amendment Personhood, supra*, 72 St. John's L.R., at 534-39; Lynch, *supra*. Whether or not it can be ascertained at any point in time that unborn or partially born children are human is absurd; if the parents are human they cannot be anything but human.[41]

Given a state's obligation to ensure life is not taken without due process of law, the state has a legitimate interest

[40] Case & Steirs, BIOLOGY; OBSERVATION & CONCEPT:, p. 110 (1971), excretion, pp. 122, 141, 143, 149-150; ingestion, pp. 70, 80; respiration, pp. 8, 51, 64, 77; irritation, pp. 267, 329, 330; reproduction, pp. 122, 163-165, 298-299, 327, 329. A zygote has an individual developing life that is viable in *utero*, in contradistinction to the ovum and sperm which are not. Id, pp. 324-327. See next footnote.

[41] The fact that the zygote is not viable extrauterine does not negate the fact of its life. All life is environmentally dependent. No one would seriously consider sending an astronaut tied to an "umbilical cord" on a space walk to test whether or not the astronaut was a life by cutting the umbilical cord to see if the astronaut could survive; such a proposition is absurd. Similarly, a fetus securely within the womb will die if there is an abruption of the placenta. Jacobs, et al, MDs, OBSTETRICS AND GYNECOLOGY, FAMILY HEALTH & MEDICAL GUIDE (1979), page 93.

in denying the absolute right to take the life of unborn or partially born children. Its citizens, and the citizens of every state, have an interest in ensuring that there exist safeguards so that unborn and partially born children do not become victims of genocide. (*E.g.*, *International Convention on the Prevention and Punishment of the Crime of Genocide*, Congressional Digest, December 1984; U.S. Const., Art. VI, cl. 2 (treaties).[42] Accordingly, any opinion that states otherwise is void as being repugnant to the doctrine of *jus cogens*.

One last problem remains. Below, Nebraska asserted that partially born children were "persons," in view of the 14th Amendment. In fact, they are present members of "Posterity." As the issue of personhood was in fact raised, a slip of the pen should not foreclose this Court from considering that issue. The Court has options. It can order supplemental briefing on the arguments, or reverse and remand on this issue to allow the parties to develop the issue below in order to allow this court the benefit of discussion.

IV.

NON-JOINDER AND FAILURE TO APPOINT A *GUARDIAN AD LITEM* REQUIRES REVERSAL

The Federal Rules of Civil Procedure, Rule 19,[43]

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[42] Clearly, the Constitution implicitly recognizes the right to privacy. U.S. Const., 2d Amend. (Quartering of soldiers), and 4th Amend. (search and seizure); *Katz v. United States*, 389 U.S. 347 (1967), and its progeny. But it is equally clear that a person cannot use the right of privacy and the right to do with one's body what he or she wishes if the conduct amounts, under state law, to a crime. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

[43] **"(a) Persons to be joined if Feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction action shall be joined as a party in the action if ... (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's liability to protect that interest or (ii) leave any of the persons already a party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. * * * *"**(b) Determination by Court Whenever Joinder Not Feasible.** If a person as described in (a)(1) - (2) hereof cannot be make a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, **the absent party being thus regarded as indispensable**. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; . . . . [Emphasis added]"

provides, in relevant part, that persons whose interests as a practical matter would be impaired by their absence should be joined. Certainly, this is a case where the lives of millions of innocent unborn and partially born children are at stake. Further, Rule 17,[44] in relevant part, provides that the court should appoint a *guardian* for infants and incompetents. Such is the case at bar. The court below should have appointed an advocate for the protection of unborn and partially unborn children.

At common law, with few exceptions, the tenant in possession of a fee tail could be enjoined from alienation by those with a right to inherit. Moreover, a *guardian ad litem*, a guardian appointed by a court, could prosecute or defend for an infant in any suit to which he may be a part, 2 Stephens Commentaries 342 (1841), or by the State acting in *Parens patriae*. *McIntosh v. Dill*, 86 Okla. 1, 205 P. 917, 925 (1922); 17 Halsbury's Laws of England (1st Ed, 1911), Infants §§ 132, 135. Unborn and partially children had a common law protectable interest. As already noted, *ante* p. 10 *citing* Lord Coke, while it is was not murder to kill a child

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[44] FRCP, rule 17, provides, in relevant part:

"(c) Infants or Incompetent Persons. . . . The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person."

in a mother's womb, it was still a great misprision (crime)! Unborn children were a life in being for purposes of the rule against perpetuities. Gray, op. cit. And it does not appear that common law barred tort actions for prenatal injuries, *Sinkler v. Kneale*, *supra*, 164 A.2d 93, 94 (1960), which could be brought by a representative. 2 Stephens Commentaries 342 (1841); *McIntosh v. Dill*, *supra*, 205 P. 917 (1922); 17 Halsbury's Laws of England (1st Ed, 1911) Infants §§ 132, 135.

In the case below, if unborn and partially born children are entitled to constitutional protection, they have an interest in partial birth abortion as it bears on a decision "that might impair or impede their very lives." To suggest that innocent unborn and partially born children have no right to an advocate to defend their lives when we recognize that the condemned have a right to an advocate on review of their death penalty (*e.g., Douglas v. California*, 372 U.S. 353 (1963); *Tison v. Arizona* (1987) 481 U.S. 137) would be absurd. *See generally, To be or not to be, supra*; *Fourteenth Amendment Personhood, supra*; Lynch, *supra*.

The fact of the matter is, that each of the cases cited by the Court below were decided in the absence of a *guardian ad litem* to protect the rights of unborn and partially born children. Accordingly, this court should reverse and remand for proper representation and advocacy if the court is not convinced that it should reach the issue of whether unborn and partially born children are included as present members of "Posterity."

CONCLUSION

Based upon the foregoing, this Court should overrule *Roe v. Wade*, 410 U.S. 113 (1973) and its *progeny* as unsound in principle and unworkable in practice, reverse, and remand for further proceedings not inconsistent with this court's views.

Date: February 24, 2000.

Respectfully submitted,

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APPENDIX
EXCERPTS FROM
Farrand, Max, THE CONSTITUTIONAL DEBATES*

[129]

COMMITTEE OF DETAIL, I

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[Proceedings of the Convention, June 19 -- July 23.]

[152]

COMMITTEE OF DETAIL, IV

*****

VI

We the People of (*and*) the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New. York, New. Jersey, Pennsylvania, Delaware, Maryland, Virginia, North. Carolina, South. Carolina and Georgia do ordain declare and establish the following Constitution for the Government of ourselves and of our Posterity.

1.

*****

[163]

COMMITTEE OF DETAIL, IX

*****

IX

We the People of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Con-

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* Pages from Farrand's are indicated at the beginning of the page in [ ]. All punctuation and capitalization is exactly as found in Farrand's, which faithfully follows the manuscript originals in Madison's book. All footnotes were omitted unless deemed important to the issues under consideration. The most commonly omitted footnote says "Found among the Wilson Papers and in Wilson's handwriting. Portions in parentheses represent parts crossed out. Italics represent later insertions."

necticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

1.

*****

[177]

Monday **MADISON** **August 6**

MADISON

Monday August 6th. In Convention

<Mr. John Francis Mercer from Maryland took his seat.>

Mr. Rutlidge <delivered in> the Report of the Committee of detail as follows: < a printed copy being at the same time furnished to each member.>

We the people of the States of New Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia do ordain, declare, and establish the following Constitution for the Government of Ourselves and our Posterity.

Article I

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[193]

TUESDAY, AUGUST 7, 1787.

JOURNAL

Tuesday August 7, 1787.

[To refer the report to a Committee of the whole Ayes - 5; noes - 4.

Delaware being represented during the Debate a question was again taken on ye Committee of ye whole Ayes ---

3; noes --- 6.]

On the question to agree to the Preamble to the constitution as reported from the committee to whom were referred the Proceedings of the Convention -- it was passed unan: in the affirmative [Ayes -- 10; noes --- 0.]

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[196]

Tuesday **MADISON** **August 7**

MADISON

Teusday August 7th. In Convention

The Report of the Committee <of detail being> taken up

...

******

The <preamble> of the Report was agreed to nem. con. So were Art: I & II.

[209]

Tuesday MCHENRY Augt 7

MCHENRY

Augt. 7.

*****

The preamble or caption and the 1. and 2. article passed without debate, ...

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[565]

COMMITTEE OF STYLE

Proceedings of Convention Referred to the Committee of Style and Arrangement.

We the People of the States of New-Hampshire, Massachusetts, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and

Georgia do ordain, declare and establish the following Constitution for the Government of ourselves and our Posterity.

ARTICLE I.

*****

[590]

COMMITTEE OF STYLE

Report of Committee of Style

WE, the People of the United States, in order to form

a more perfect union, to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****

[604]

THURSDAY, SEPTEMBER 13, 1787.

JOURNAL

Thursday September 13, 1787.

*****

Resolved that the preceding Constitution be laid before the United States in Congress assembled, and that it is the opinion of this Convention that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the recommendation of it's Legislature; for their asent and ratification.

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[604]

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[To postpoine the report respecting the 22nd and 23rd Ayes -- 9; noes -- 1.]

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To strike out the word "to" before establish justice Ayes --- 8; noes --- 2,]

[641]

MONDAY, SEPTEMBER 17, 1787.

JOURNAL

Monday September 17, 1787.

Detail of Ayes and Noes

	The Constitution Unanimously agreed to.	To deliver over the Journal and papers to the President	
	[567]	[568]	[569]
New Hampshire	Aye	Aye	aye
Massachusetts	Aye	Aye	aye
Rhode Island	Aye	Aye	aye
Connecticut	Aye	Aye	aye
New York	Aye	Aye	aye
New Jersey	Aye	Aye	aye
Pennsylvania	Aye	Aye	aye
Delaware	Aye	aye	aye
Maryland	Aye	aye	no
Virginia	Aye	aye	aye
North Carolina	Aye	aye	aye
South Carolina	Aye	dd	aye
Georgia	Aye	aye	aye

MADISON

Monday Sepr. 17. 1787. In Convention

The engrossed Constitution being read, ...

Docr. Franklin rose with a speech in hand ....

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[643]

... --- He then moved that the Constitution be signed ...

*****

[644]

*****

On the question to agree to the Constitution enrolled in order to be signed. It was agreed to by all the States answering ay.

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[649]

MCHENRY

Monday Sepr. 1787.

Read the engrossed Constitution. Altered the representation in the house of representatives.

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[651]

THE CONSTITUTION
OF THE UNITED STATES

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

*****